

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

11 R SALES, INC., a Washington
corporation,

Plaintiff,

v.

ROBERT YARTO, STEVE WINKLER, and
YARTO INTERNATIONAL GROUP, L.P.,

Defendants.

No. CV-07-3006-FVS

JEFF LUBLIN, in his separate
capacity, JAVIER MUNGUIA, in his
separate capacity, WASHINGTON
EXPORT, LLC, and U.S. EXPORT, LLC,

Plaintiffs,

v.

**ORDER RE SUMMARY JUDGMENT
MOTIONS**

YARTO INTERNATIONAL GROUP, L.P., a
Texas Limited Partnership, YARTO
INTERNATIONAL TRADING COMPANY,
L.P., a Texas Limited Partnership,
ROBERT YARTO, in his separate
capacity, and STEVE WINKLER, in his
separate capacity,

Defendants.

YARTO INTERNATIONAL GROUP, L.P.,
YARTO INTERNATIONAL TRADING
COMPANY, L.P., ROBERT YARTO and
STEVE WINKLER,

Plaintiffs,

v.

WASHINGTON EXPORT, LLC, et al.,

Defendants.

1 **THIS MATTER** came before the Court on September 3, 2008, based
2 upon cross motions for summary judgment.

3 **BACKGROUND**

4 Washington Export, LLC ("WashEx") was in the business of
5 purchasing fruit from suppliers and selling it to buyers. Three of
6 the companies from which WashEx purchased fruit were Borton & Sons,
7 Inc. ("Borton"), Evans Fruit Company ("Evans"), and 11 R Sales, Inc.
8 ("11 R"). (11 R is Evans' sales arm.) One of the companies to which
9 WashEx sold fruit was Yarto International Trading Company ("YITC").

10 Javier Munguia and Jeff Lublin were WashEx's sole "members."
11 During September of 2005, they sold their membership interests to
12 Yarto International Group, L.P. ("YIG"). The terms of the sale were
13 set forth in a contract that is entitled "Membership Interest
14 Purchase Agreement." After selling their membership interests to
15 YIG, they went to work for YITC managing WashEx's day-to-day
16 operations. The terms of their employment were set forth in separate
17 contracts, each of which is entitled "Key Employment Agreement."

18 YITC depended upon a line of credit from Wells Fargo for the
19 cash that it needed in order to finance its operations. During the
20 Spring or Summer of 2006, Wells Fargo began restricting YITC's access
21 to credit. This put YITC under enormous financial pressure. In
22 response, YITC applied to GE Finance for a new line of credit.

23 YITC's President is Steve Winkler. Its Chief Executive Officer
24 is Robert Yarto. By August of 2006, the business relationship
25 between Messrs. Yarto and Winkler, on the one hand, and Messrs.
26 Munguia and Lublin, on other, was badly strained. According to the

1 latter, YITC was not paying WashEx quickly enough to enable WashEx to
2 pay its suppliers in a timely manner. As a result, Messrs. Munguia
3 and Lublin demanded that YITC pay the unpaid suppliers.

4 Late in August or early in September, Messrs. Munguia and Lublin
5 invited Messrs. Yarto and Winkler to travel to Yakima, Washington,
6 for a meeting. By that time, Messrs. Winkler and Yarto thought that
7 GE Finance was close to issuing a line of credit to YITC. The
8 September 6th meeting was stormy. The persons with whom Messrs.
9 Yarto and Winkler met -- which included Mr. Munguia, Mr. Lublin, and
10 representatives of Borton, Evans, and 11 R -- allegedly demanded that
11 YIG return control of WashEx to Messrs. Munguia and Lublin and that
12 Messrs. Yarto and Winkler pay certain debts that WashEx owed to its
13 creditors. Not only that, but they threatened litigation in the
14 event their demands were not met.

15 Despite facing substantial pressure on September 6th, Messrs.
16 Yarto and Winkler did not yield immediately. To the contrary, they
17 began negotiating with their opponents. Negotiations went on for
18 several weeks. During October of 2006, Messrs. Yarto and Winkler
19 signed a number of contracts. One is entitled "Rescission of
20 Membership Interest Purchase Agreement and Termination of Key
21 Employee Agreements" (hereinafter "Rescission Agreement"). Its
22 function was to return ownership of WashEx to Messrs. Lublin and
23 Munguia and to sever their employment relationship with YITC.
24 Another contract is entitled "Settlement Agreement." Its function
25 was to determine who is responsible for payment of WashEx's debts to
26 its creditors. Messrs. Yarto and Winkler agreed to pay a significant

1 part of WashEx's debts. Also, they agreed to issue promissory notes
2 to Borton and 11 R, which they did. On its face, each note required
3 them to begin making substantial payments to 11 R and Borton during
4 October of 2006.

5 The October contracts did not provide the resolution that the
6 parties expected. Although WashEx continued to purchase fruit from
7 Evans and Borton and sell it to YITC, a dispute arose with respect to
8 whether Messrs. Yarto and Winkler were fulfilling their contractual
9 commitments under the Settlement Agreement and promissory notes. 11
10 R and WashEx filed lawsuits during January of 2007. Other lawsuits
11 followed. While litigation was pending, Evans and Borton began
12 negotiating with WashEx. On or about April 10, 2007, they entered
13 into a contract that is entitled "Conditional Forbearance and
14 Financing Agreement" (hereinafter "Conditional Forbearance"). In
15 exchange for significant concessions, Evans and Borton agreed to
16 refrain from aggressively seeking to collect money that WashEx owed
17 them.

18 **DURESS**

19 Messrs. Yarto and Winkler allege that, during the Spring or
20 Summer of 2006, Messrs. Munguia and Lublin decided to regain control
21 of WashEx at YIG's expense. According to Messrs. Yarto and Winkler,
22 Evans and Borton encouraged them to do so. Messrs. Yarto and Winkler
23 allege that the September 6th meeting was part of the plan. At the
24 meeting, Mr. Munguia, Mr. Lublin, and representatives of Evans and
25 Borton demanded that YIG relinquish control of WashEx, and that
26 Messrs. Yarto and Winkler assume liability for WashEx's debts to its

1 creditors. They backed up their demands with threats of lawsuits.
2 The threats had teeth because Messrs. Yarto and Winkler were in a
3 vulnerable position at that time. YITC had to have a new line of
4 credit in order to survive. Everyone present knew that. They also
5 knew that GE Finance would deny YITC's application for a new line of
6 credit in the event that Mr. Munguia, Mr. Lublin, or any of the
7 others filed suit. Faced with this economic reality, say Messrs.
8 Yarto and Winkler, they had no choice but to sign the Rescission
9 Agreement, the Settlement Agreement, and the promissory notes.
10 Believing, as they do, that they were coerced into signing those
11 agreements, they have pleaded duress as an affirmative defense to the
12 other parties' attempts to enforce the contracts.

13 Mr. Munguia, Mr. Lublin, and WashEx move for summary judgment.
14 In evaluating their motion, the Court views the evidence concerning
15 duress in the light most favorable to Messrs. Yarto and Winkler.
16 *T.W. Electric Service, Inc. v. Pacific Electrical Contractors Assoc.*,
17 809 F.2d 626, 630 (9th Cir.1987). Nevertheless, the Court must grant
18 the motion unless a rational jury could find that Messrs. Munguia and
19 Lublin engaged in wrongful or oppressive conduct which placed so much
20 pressure upon Messrs. Yarto and Winkler that their decision to sign
21 the disputed contracts was involuntary. See *Retail Clerks Health &*
22 *Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944,
23 640 P.2d 1051 (1982). As the record now stands, factual issues exist
24 with respect to whether Messrs. Munguia and Lublin breached fiduciary
25 duties to their employer during the Spring and Summer of 2006 and
26 whether they had a good-faith basis for threatening litigation on

1 September 6th. Even so, they are entitled to summary judgment.
2 Messrs. Yarto and Winkler cannot prove that, but for Mr. Munguia's
3 and Mr. Lublin's threat, they would have refused to sign the disputed
4 contracts. To the contrary, it is clear that Messrs. Yarto and
5 Winkler would have signed the contracts even if Messrs. Munguia and
6 Lublin had remained silent throughout the September 6th meeting.

7 Messrs. Munguia and Lublin were not the only ones to threaten
8 litigation. Evans and Borton made threats of their own. Had Evans
9 and Borton filed actions against YITC and YIG, GE Finance would have
10 denied YITC's application for a new line of credit. Thus, it was the
11 threats of Evans and Borton, as much as the threats of Messrs.
12 Munguia and Lublin, that placed economic pressure upon Messrs. Yarto
13 and Winkler. Given this undisputed circumstance, a rational jury
14 would be unable to find that, but for Mr. Munguia's and Mr. Lublin's
15 threat, Messrs. Yarto and Winkler would have refused to sign the
16 disputed contracts. In other words, Messrs. Yarto and Winkler cannot
17 prove their decision to sign the contracts was caused by Mr.
18 Munguia's and Mr. Lublin's threats. Without a causal connection, Mr.
19 Yarto's and Mr. Winkler's duress defense cannot succeed even assuming
20 that their allegations about Mr. Munguia's and Mr. Lublin's behavior
21 are accurate.

22 Neither Evans nor Borton filed a motion seeking dismissal of Mr.
23 Yarto's and Mr. Winkler's duress defense. It was not until oral
24 argument that they challenged the defense. The fact that they waited
25 until then does not preclude the Court from considering the merits of
26 the defense as it relates to them. After all, a district court may

1 dismiss an affirmative defense sua sponte if the defendant has had a
2 reasonable opportunity to develop a factual foundation for the
3 defense, the defendant is given reasonable notice that the defense is
4 being challenged, and the defendant cannot prove one of the elements
5 of the defense. See *Portsmouth Square, Inc. v. Shareholders*
6 *Protective Comm.*, 770 F.2d 866, 869 (9th Cir.1985) (judge dismissed
7 the plaintiff's claim sua sponte at a pretrial conference). All of
8 those conditions exist here. Messrs. Yarto and Winkler have had
9 ample time to develop the factual basis of their duress defense.
10 WashEx filed a motion to dismiss the defense, and the Court advised
11 Messrs. Yarto and Winkler that it was inclined to dismiss the defense
12 for reasons other than the ones asserted by WashEx.

13 Viewing the evidence in the light most favorable to Messrs.
14 Yarto and Winkler, the Court is satisfied that a rational jury could
15 find that Evans and Borton threatened litigation at the September 6th
16 meeting in order to pressure them to make concessions and that they
17 did, indeed, experience economic pressure as a result of the threats.
18 But such findings, were a jury to make them, would not be enough to
19 sustain a defense of duress. Prior to September 6th, Evans and
20 Borton had sold fruit to WashEx for which they had not been paid.
21 They were entitled to file actions in order to collect the sums that
22 they were owed. Since they had good-faith grounds for threatening
23 litigation, their threats were not wrongful. *Pleuss v. City of*
24 *Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972) ("a mere threat to
25 exercise a legal right made in good faith is neither duress nor
26 coercion in law"). Consequently, even if Evans' and Borton's threats

1 at the September 6th meeting created economic pressure (and they
2 did), the pressure that their threats created does not constitute
3 duress. *See Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 799, 664
4 P.2d 4, review denied, 100 Wn.2d 1014 (1983). Evans and Borton are
5 entitled to summary judgment on Mr. Yarto's and Mr. Winkler's duress
6 defense, albeit for different reasons than Mr. Munguia, Mr. Lublin,
7 and WashEx.

8 **THE \$2,042,000 PROMISE**

9 Paragraph 2 of the Settlement Agreement lists WashEx's
10 liabilities. (Settlement Agreement, ¶ 2, at 2.) WashEx owed a total
11 of \$3,033,159.43 to Evans and Borton. Paragraph 2 defines this
12 obligation as "the 'Debt.'" *Id.* WashEx also owed approximately
13 "\$1.85 million" to "other trade creditors." *Id.* Unlike the
14 liability to Evans and Borton, the Settlement Agreement does not
15 provide a specific definition for this obligation.

16 After listing WashEx's liabilities, paragraph 2 goes on to
17 state, "R. Yarto and Winkler hereby personally assume liability for
18 the Debt and the monies due to other trade creditors as identified on
19 Exhibit A, subject to the following limitations" The
20 limitations are set forth in subparagraphs "A" through "E" of
21 paragraph 2. One of the more important limitations is contained in
22 subparagraph 2.A.:

23 Lublin and Munguia are primarily responsible for
24 \$2,042,000.00 of the Debt. Lublin and Munguia . . . hereby
25 agree . . . to personally assume such share of the Debt by
26 hereby personally guaranteeing and ensuring payment of the
Debt and specific liabilities set forth on Exhibit A, up to
the amount of \$2,042,000.00. Lublin and Munguia have no
responsibility, primary or otherwise, for any of the Debt

1 over and above the \$2,042,000.00 for which they have
2 primary responsibility In the event that Evans,
3 Borton and/or other trade creditors seek recovery against
4 Washington Export, LLC, Lublin and/or Munguia for any
5 portion of the Debt or any liabilities set forth on the
6 attached Exhibit A in excess of the \$2,042,000 for which
7 Lublin and Munguia have primary responsibility, R. Yarto
8 and Winkler shall indemnify, defend and hold [harmless]
9 Lublin and Munguia, and Washington Export[.]

10 (Settlement Agreement, ¶ 2.A., at 2.) Both sides agree that Messrs.
11 Munguia and Lublin must pay \$2,042,000.00 toward WashEx's
12 obligations. At that point, the agreement ends. Messrs. Yarto and
13 Winkler argue that Messrs. Munguia and Lublin must pay the entire sum
14 to Evans and Borton. Messrs. Munguia and Lublin argue that they were
15 entitled to divide payments between Evans and Borton, on the one
16 hand, and the other trade creditors, on the other.

17 Each side cites language in subparagraph 2.A. that supports its
18 position. The first sentence of subparagraph 2.A. states, "Lublin
19 and Munguia are primarily responsible for \$2,042,000.00 of the Debt."
20 Since the term "Debt" means the sum of WashEx's liability to Borton
21 and Evans, and since Messrs. Munguia and Lublin agreed to assume
22 primary responsibility for "\$2,042,000.00 of the Debt," the first
23 sentence indicates that Messrs. Munguia and Lublin had to pay the
24 entire amount to Evans and Borton. Subparagraph 2.A. does not stop
25 there, however. The second sentence states that Messrs. Lublin and
26 Munguia agree "to personally assume such share of the Debt by hereby
personally guaranteeing and ensuring payment of the Debt and specific
liabilities set forth on Exhibit A, up to the amount of
\$2,042,000.00." This sentence is phrased as a guaranty rather than a

1 direct obligation. For purposes of determining the scope of Mr.
2 Munguia's and Mr. Lublin's obligation under subparagraph 2.A., the
3 difference does not appear to be significant. What is significant is
4 that the \$2,042,000 guaranty covers both Debt and Exhibit A
5 liabilities. The third sentence is more like the first than the
6 second. It states, "Lublin and Munguia have no responsibility,
7 primary or otherwise, for any of the Debt over and above the
8 \$2,042,000.00 for which they have primary responsibility[.]" Like
9 the first sentence, the third makes no reference to the liabilities
10 set forth on Exhibit A. One other sentence in subparagraph 2.A. is
11 relevant. The fourth states in pertinent part:

12 In the event that Evans, Borton and/or other trade
13 creditors seek recovery against Washington Export, LLC,
14 Lublin and/or Munguia for any portion of the Debt or any
15 liabilities set forth on the attached Exhibit A in excess
16 of the \$2,042,000 for which Lublin and Munguia have primary
responsibility, R. Yarto and Winkler shall indemnify,
defend and hold [harmless] Lublin and Munguia, and
Washington Export[.]

17 (Settlement Agreement, ¶ 2.A., at 2.) The preceding sentence
18 requires Messrs. Yarto and Winkler to indemnify Mr. Munguia, Mr.
19 Lublin, and WashEx in the event that either Evans, Borton, or any
20 other trade creditor seeks to recover more than the \$2,042,000
21 obligation for which Messrs. Lublin and Munguia have assumed
22 liability. The duty of indemnification is predicated upon a
23 condition; namely, that Messrs. Lublin and Munguia have paid
24 \$2,042,000 toward either the Debt or the Exhibit A liabilities.

25 On any balanced reading of subparagraph 2.A., the first four
26 sentences are internally inconsistent. The first and third sentences

1 indicate that the \$2,042,000 obligation is a promise to pay
2 \$2,042,000 to Evans and Borton. The second and fourth sentences are
3 broader. They indicate that Messrs. Munguia and Lublin have
4 discretion to allocate payments among Evans, Borton, and the other
5 trade creditors. The inconsistency between the two groups of
6 sentences creates ambiguity. Which group -- the first and third, or
7 the second and fourth -- reflects the parties' intent?

8 Messrs. Yarto and Winkler urge the Court to consider the history
9 of the Settlement Agreement. As they point out, early drafts of the
10 agreement did not contain a definition of the term "Debt." They
11 argue that the definition was added in order to clarify that Messrs.
12 Munguia and Lublin were responsible for paying Evans and Borton.
13 There was a reason for the clarification, say Messrs. Yarto and
14 Winkler. Evans and Borton were threatening litigation; other
15 creditors were not. As Messrs. Yarto and Winkler recall, the parties
16 wanted to ensure that Evans and Borton were paid first. They decided
17 that other creditors would have to wait.

18 Mr. Yarto's and Mr. Winkler's interpretation of paragraph 2 is
19 not unreasonable. Indeed, if subparagraph 2.A. always linked the
20 \$2,042,000 obligation with the term "Debt," as the first and third
21 sentences do, Mr. Yarto's and Mr. Winkler's interpretation would be
22 compelling. But subparagraph 2.A. does not always do so. Unlike the
23 first and third sentences, the second and fourth link the \$2,042,000
24 promise with both the term "Debt" and the Exhibit A liabilities. In
25 other words, the second and fourth sentences contemplate that Messrs.
26 Munguia and Lublin will pay \$2,042,000 to Evans, Borton, and the

1 other trade creditors.

2 The principal problem with Mr. Yarto's and Mr. Winkler's
3 interpretation of subparagraph 2.A. is that it renders the second and
4 fourth sentences nonsensical as written. In order to make sense of
5 the second and fourth sentences, the Court would have to excise those
6 parts of both sentences which indicate that the \$2,042,000 promise
7 involves both Debt (*i.e.*, Evans and Borton) and Exhibit A liabilities
8 (*i.e.*, other trade creditors). That Mr. Yarto's and Mr. Winkler's
9 interpretation requires such drastic revision of subparagraph 2.A.
10 raises a red flag. "[I]n the interpretation of contracts[,] . . .
11 every word and phrase must be presumed to have been employed with a
12 purpose and must be given a meaning and effect whenever reasonably
13 possible[.]" *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832
14 (1950).

15 There is an interpretation of subparagraph 2.A. that preserves
16 the integrity of the second and fourth sentences and reconciles them
17 with the first and third. One may assume that, in drafting the first
18 and third sentences, the parties were insufficiently specific; that
19 is to say, they failed to explain in detail what everyone understood:
20 Mr. Munguia's and Mr. Lublin's \$2,042,000 promise is a promise to pay
21 \$2,042,000 to Evans, Borton, and the other trade creditors listed on
22 Exhibit A. This approach to subparagraph 2.A. makes sense for two
23 reasons. First, "[a]n interpretation of a writing which gives effect
24 to all of its provisions is favored over one which renders some of
25 the language meaningless or ineffective." *Wagner v. Wagner*, 95 Wn.2d
26 94, 101, 621 P.2d 1279 (1980). Second, it is consistent with another

1 contract that the parties executed at the same time as the Settlement
2 Agreement.

3 Paragraph 4.A. of the Rescission Agreement states, "As is more
4 particularly described in the . . . Settlement Agreement, R. Yarto
5 and Winkler have agreed to be solely responsible for all amounts owed
6 by Washington Export to suppliers of agricultural products and other
7 service providers, save for \$2,042,000, which shall be the primary
8 responsibility of Lublin and Munguia." The phrase "suppliers of
9 agricultural products and other service providers" appears to include
10 all of WashEx's creditors, not just Evans and Borton. Consequently,
11 the Rescission Agreement reinforces the conclusion that Messrs.
12 Munguia and Lublin agreed to pay \$2,042,000 toward WashEx's
13 obligations to Evans, Borton, and the other creditors listed on
14 Exhibit A.

15 Messrs. Yarto and Winkler argue that the Court places too much
16 weight upon the Rescission Agreement. As they observe, the
17 Rescission Agreement consciously defers to the Settlement Agreement.
18 The sentence that the Court quotes begins with the clause, "[a]s is
19 more particularly described in the . . . Settlement Agreement[.]"
20 This clause indicates, say Messrs. Yarto and Winkler, that it is the
21 Settlement Agreement, not the Rescission Agreement, which sets forth
22 their responsibilities with respect to WashEx's liabilities. The
23 Court agrees, up to a point. To the extent that there is conflict
24 between the two agreements with respect to Mr. Yarto's and Mr.
25 Winkler's financial obligations, the Settlement Agreement controls.
26 But there is a conflict between the two only if the Court adopts Mr.

1 Yarto's and Mr. Winkler's interpretation of the Settlement Agreement.
2 If the Court adopts Mr. Munguia's and Mr. Lublin's interpretation of
3 subparagraph 2.A., the two contracts complement one another; which
4 makes Mr. Munguia's and Mr. Lublin's interpretation all the more
5 convincing.

6 The parties have filed cross motions for summary judgment with
7 respect to the proper interpretation of subparagraph 2.A. At oral
8 argument, Messrs. Yarto and Winkler acknowledged that the Court is
9 not inclined to grant their motion. Even so, they insisted that they
10 have created a jury issue with respect to the meaning of paragraph
11 2.A. The Court agrees. The history of the Settlement Agreement
12 supports their contention that the parties intentionally limited the
13 meaning of the term "Debt" to the sum of WashEx's liabilities to
14 Evans and Borton. A rational jury could be persuaded by this
15 evidence and the text of subparagraph 2.A. that the first and third
16 sentences, rather than the second and fourth, reflect the actual
17 intent of the parties, *i.e.*, that the parties intended Messrs.
18 Munguia and Lublin to pay the entire \$2,042,000 to Evans and Borton.
19 Admittedly, Mr. Yarto's and Mr. Winkler's behavior immediately after
20 signing the Settlement Agreement appears to be inconsistent with the
21 position they are now taking. However, it is the jury's function,
22 not the Court's, to assess the significance of extrinsic evidence.

23 In sum, the Court is confronted with competing interpretations
24 of paragraph 2. While the interpretation advanced by Messrs. Munguia
25 and Lublin is much more persuasive, the Court cannot say that Mr.
26 Yarto's and Mr. Winkler's interpretation is unreasonable. In

1 situations such as this, the rule is clear. Summary judgment is
2 inappropriate. See *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73,
3 83, 60 P.3d 1245 (2003) ("summary judgment is not proper if the
4 parties' written contract, viewed in light of the parties' other
5 objective manifestations, has two or more reasonable but competing
6 meanings'" (quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App.
7 1, 10, 937 P.2d 1143 (1997))).

8 **MUTUAL PROMISES VERSUS CONDITIONS PRECEDENT**

9 Messrs. Yarto and Winkler argue that certain provisions within
10 subparagraphs "A" through "E" of paragraph 2 are conditions precedent
11 to their duty to pay WashEx's debts to Evans, Borton, and the other
12 creditors listed on Exhibit A. "'Conditions precedent' are 'those
13 facts and events, occurring subsequently to the making of a valid
14 contract, that must exist or occur before there is a right to
15 immediate performance, before there is a breach of contract duty,
16 before the usual judicial remedies are available.'" *Tacoma*
17 *Northpark, L.L. C. v. NW, L.L. C.*, 123 Wn. App. 73, 79, 96 P.3d 454
18 (2004) (quoting *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526
19 (1964)). The provisions cited by Messrs. Yarto and Winkler cannot
20 reasonably be interpreted as conditions precedent. Subparagraph 2.A.
21 is instructive. Messrs. Munguia and Lublin promised to pay
22 \$2,042,000 toward WashEx's debts to Evans, Borton, and (perhaps) the
23 other creditors listed on Exhibit A. If this is a condition
24 precedent to liability on the part of Messrs. Yarto and Winkler, one
25 would expect the Settlement Agreement to contain language relieving
26 them of their duty to pay in the event the condition does not occur.

1 That is not what the Settlement Agreement does. Although it
2 expressly recognizes that Messrs. Munguia and Lublin might not
3 perform their promise to pay \$2,042,000, the Settlement Agreement
4 does not relieve Messrs. Yarto and Winkler of their duty to pay. To
5 the contrary, the first sentence of Paragraph 2.D. states, "In the
6 event Lublin and Munguia default on any of the obligations assumed in
7 paragraph 2.A., . . . R. Yarto and Winkler acknowledge and agree that
8 they shall be liable as guarantors of such obligations[.]"
9 (Settlement Agreement, ¶ 2.D., at 3.) The fact that Messrs. Yarto
10 and Winkler agreed to guaranty Mr. Munguia's and Mr. Lublin's
11 performance means that their performance is not a condition precedent
12 to Mr. Yarto's and Mr. Winkler's duty to pay.

13 **GUARANTY**

14 As observed in the preceding section, paragraph 2.D. contains a
15 guaranty. "In the event Lublin and Munguia default on any of the
16 obligations assumed in paragraph 2.A. [*i.e.*, their promise to pay
17 \$2,042,000 toward WashEx's obligations to Evans, Borton, and the
18 other trade creditors], . . . R. Yarto and Winkler . . . acknowledge
19 and agree that they shall be liable as guarantors of such
20 obligations[.]" (Settlement Agreement, ¶ 2.D., at 3.) The existence
21 of this guaranty helps clarify responsibility for WashEx's debts. It
22 is well established that a person may not guaranty his own
23 obligation. *See, e.g., Wilson Court Ltd. P'ship v. Tony Maroni's,*
24 *Inc.*, 134 Wn.2d 692, 707, 952 P.2d 590 (1998) (citations omitted).
25 The fact that Messrs. Yarto and Winkler agreed to guaranty Mr.
26 Munguia's and Mr. Lublin's promise to pay \$2,042,000 means that the

1 obligation is Mr. Munguia's and Mr. Lublin's, not Mr. Yarto's and Mr.
2 Winkler's. Insofar as the \$2,042,000 promise is concerned, Messrs.
3 Yarto and Winkler are guarantors, not obligors.

4 Messrs. Yarto and Winkler argue that the guaranty which is set
5 forth in paragraph 2.D. is conditioned upon 11 R and Borton seeking
6 payment from Messrs. Munguia and Lublin. They are incorrect. A
7 guaranty may be either absolute or conditional:

8 An absolute guaranty is an unconditional undertaking on the
9 part of the guarantor that the debtor will pay the debt or
10 perform the obligation. A conditional guaranty
11 contemplates, as a condition to liability on the part of
12 the guarantor, the happening of some contingent event other
than the default of the principal debtor or the performance
of some act on the part of the obligee.

13 *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943)
14 (emphasis and citation omitted). "The most common kind of
15 conditional guarantor with regard to a money debt is a guarantor of
16 collection." *Amick v. Baugh*, 66 Wn.2d 298, 305-6, 402 P.2d 342
17 (1965). In such situations, "it is expressly agreed between the
18 guarantor and the creditor that the guarantor's liability arises only
19 after the creditor has obtained judgment and pursued execution to
20 incomplete satisfaction of the judgment." *Id.* at 306. No such
21 condition is contained in paragraph 2.D. To the contrary, the only
22 contingency upon which Messrs. Yarto and Winkler predicated their
23 guaranty was default by Messrs. Munguia and Lublin. It follows that
24 the guaranty given by Messrs. Yarto and Winkler is absolute.

25 **PROMISSORY NOTES**

26 During October of 2006, Messrs. Yarto and Winkler issued
promissory notes to 11 R and Borton. Each note required them to

1 begin making payments during October of 2006. One of the issues
2 raised by Messrs. Yarto and Winkler is whether the notes are fully
3 integrated; that is to say, whether the notes represent a complete
4 expression of their obligations to 11 R and Borton, respectively. If
5 the notes are "not a complete expression of the parties' intent -- in
6 other words, if [they're] only partially integrated -- [they] may be
7 supplemented or replaced by consistent terms or agreements[.]" *Lopez*
8 *v. Reynoso*, 129 Wn. App. 165, 171-2, 118 P.3d 398 (2005), review
9 *denied*, 157 Wn.2d 1003 (2006). The notes are only partially
10 integrated, say Messrs. Yarto and Winkler. As they point out, the
11 Supreme Court of the State of Washington has stated that a promissory
12 note and contract should be read together when the two are part of a
13 single transaction. See, e.g., *Kathman v. Wakeling*, 69 Wn.2d 195,
14 200, 417 P.2d 840 (1966) (when a note is issued in connection with a
15 purchase agreement, the "note and agreement are to be construed
16 together and the meaning gathered from the entire context, rather
17 than from the note itself"); *Wilson v. Kirchan*, 143 Wash. 342, 343-
18 44, 255 P. 368 (1927) ("we have committed ourselves to the doctrine
19 that the note and mortgage, although separate instruments, are a
20 single contract, and that reference will be made to both to determine
21 its terms if they are not in conflict"). This case is one in which
22 promissory notes were executed in connection with a larger agreement.
23 Given the preceding authorities, the promissory notes that Messrs.
24 Yarto and Winkler issued to 11 R and Borton should be interpreted in
25 light of the Settlement Agreement, particularly paragraph 2.E.

26 According to the Settlement Agreement, the promissory notes have

1 a purpose. Paragraph 2.E. says that they are to serve as "security
2 for 100% of the amounts owed by Washington Export, LLC, to Evans and
3 Borton[.]" The parties' statement of purpose is significant. They
4 could have said that the notes' purpose is to serve as security for
5 one-hundred percent of the amounts owed by Messrs. Yarto and Winkler.
6 For whatever reason, they did not say that. Instead, they said that
7 the notes serve as "security for 100% of the amounts" that WashEx
8 owes to Evans and Borton.

9 Messrs. Yarto and Winkler are not the only ones who are
10 responsible for WashEx's debt to Evans and Borton. Messrs. Munguia
11 and Lublin are also responsible. Since Messrs. Munguia and Lublin
12 are responsible for some of WashEx's debt to Evans and Borton, and
13 since the notes serve as "security for 100%" of WashEx's debt to
14 those companies, the notes serve, in part, to secure Mr. Munguia's
15 and Mr. Lublin's share of the debt to Evans and Borton.

16 Messrs. Munguia and Lublin did not sign the notes. Messrs.
17 Yarto and Winkler did. By signing notes that serve, in part, to
18 secure Mr. Munguia's and Mr. Lublin's debt to Evans and Borton, it
19 appears that Messrs. Yarto and Winkler are guaranteeing payment of
20 Mr. Munguia's and Mr. Lublin's share of the debt. "Exactly," say
21 Messrs. Yarto and Winkler. They characterize the notes as
22 instruments which they pledged as security for their guaranty.

23 If Messrs. Yarto and Winkler are correct, what are the
24 implications? According to them, the notes do not come into play
25 unless Messrs. Munguia and Lublin default on their promise to pay
26 their share of the debt to Evans and Borton. In other words, on Mr.

1 Yarto's and Mr. Winkler's view of the notes, they were not required
2 to begin making payments during October of 2006 as provided by the
3 notes. To the contrary, they argue that they had until January 31,
4 2007 -- the deadline set in paragraph 2.B. -- to satisfy their
5 obligations under the Settlement Agreement.

6 While the interpretation advocated by Messrs. Yarto and Winkler
7 is not entirely unreasonable, it does not account for all the facts.
8 The parties attached a sample promissory note to the Settlement
9 Agreement. Presumably, Messrs. Yarto and Winkler read the sample
10 note before they signed the Settlement Agreement. Thus, they
11 arguably knew that, by signing the Settlement Agreement and executing
12 the notes, they were agreeing to make substantial payments to Evans
13 and Borton beginning in October.

14 Messrs. Yarto and Winkler protest that this would have meant
15 paying more than their share of WashEx's debts to Evans and Borton.
16 Perhaps so, but the Settlement Agreement seems to anticipate this
17 contingency. Paragraph 2.D.4. states, "Lublin and Munguia shall
18 issue promissory notes with reasonable repayment terms to R. Yarto
19 and Winkler for any portion of their or Washington Export LLC's
20 obligation advanced by R. Yarto and Winkler." It is not entirely
21 clear whether paragraph 2.D.4. applies in this context. However,
22 assuming it does, it seems to indicate that any money which Messrs.
23 Yarto and Winkler paid to Evans and Borton beyond that required by
24 the Settlement Agreement would have constituted an advance to Messrs.
25 Munguia and Lublin.

26 Here, as in the dispute over the scope of Mr. Munguia's and Mr.

1 Lublin's promise to pay \$2,042,000, the Court is faced with competing
2 interpretations of ambiguous provisions. There are cogent reasons to
3 think that Messrs. Yarto and Winkler were obligated to begin making
4 payments during October of 2006. Nevertheless, the evidence that the
5 Court may consider under Federal Rule of Civil Procedure 56 is not so
6 overwhelming that a rational jury would be compelled to agree. As
7 observed above, the notes serve, in part, to secure Mr. Yarto's and
8 Mr. Winkler's guaranty of Mr. Munguia's and Mr. Lublin's obligation.
9 Although it is unlikely that a rational jury would be persuaded by
10 this evidence that Messrs. Yarto and Winkler had until January 31,
11 2007, to complete their payments to Evans and Borton, the Court
12 cannot exclude the possibility. As a result, the Court is
13 constrained to deny Borton's and 11 R's request for a ruling that
14 Messrs. Yarto and Winkler are in default on the notes.

15 **COMMENCING LITIGATION PRIOR TO JANUARY 31, 2007**

16 As explained above, a genuine issue of material fact exists with
17 respect to whether Messrs. Yarto and Winkler had until January 31,
18 2007, to satisfy their financial obligations under the Settlement
19 Agreement. Both 11 R and WashEx filed lawsuits before that date.
20 Messrs. Yarto and Winkler argue that their decision to file lawsuits
21 before January 31st constitutes a material breach of the Settlement
22 Agreement. In the State of Washington, "[a] material breach suspends
23 the injured party's duties until the breaching party cures the
24 default." *Bailie Comm., Ltd. v. Trend Business Systems*, 53 Wn. App.
25 77, 81, 765 P.2d 339 (1988) (citing *Restatement (Second) of Contracts*
26 §§ 237, 241 (1981)). Whether a breach is material is a question of

fact. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 209, 165 P.3d 1271 (2007). Section 241 of the *Restatement (Second) of Contracts* lists five circumstances that are relevant to a determination of materiality:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement, supra, § 241.¹ To date, the parties have not addressed these factors in any depth. Summary judgment is inappropriate.

PACA

Evans, Borton, and WashEx seek relief under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499s. "PACA protects sellers of perishable agricultural commodities by subjecting a 'merchant, dealer, or retailer' of perishable produce to a trust on the proceeds of the sale of perishable produce, and food derived from that produce, for the benefit of all unpaid suppliers." *Royal Foods Co., Inc. v. RJR Holdings Inc.*, 252 F.3d 1102, 1104-05 (9th Cir.2001) (quoting 7 U.S.C. § 499e(c)(2)). If, as Evans,

¹The Washington Court of Appeals has approved use of the above-quoted factors. *TMT Bear Creek Shopping Ctr., Inc.*, 140 Wn. App. at 209 and n.8.

1 Borton, and WashEx allege, they qualify as sellers of perishable
2 agricultural commodities, and if, as they further allege, YITC
3 qualifies as a dealer, then their sales to YITC may be entitled to
4 PACA trust protection:

5 PACA establishes a nonsegregated trust in which a produce
6 dealer holds produce-related assets as a fiduciary until
7 full payment is made to the produce seller. . . . "The
8 trust automatically arises in favor of a produce seller
9 upon delivery of produce and is for the benefit of all
10 unpaid suppliers or sellers involved in the transaction
11 until full payment of the sums owing has been received."

12 *Bowlin & Son, Inc. v. San Joaquin Food Serv., Inc. (In re San Joaquin*
13 *Food Serv., Inc.)*, 958 F.2d 938, 939 (9th Cir.1992) (citing and
14 quoting *C & E Enters., Inc. v. Milton Poulos, Inc. (In re Milton*
15 *Poulos, Inc.)*, 947 F.2d 1351, 1352 (9th Cir.1991) (per curiam)).

16 A seller may waive PACA trust protection. "The protection of
17 the trust is forfeited by an agreement between the parties for
18 payment that exceeds thirty days." *Baiardi Food Chain v. United*
19 *States*, 482 F.3d 238, 242 (2d Cir.), cert. denied, --- U.S. ---, 128
20 S.Ct. 307, 169 L.Ed.2d (2007). Several circuits have held that
21 waiver occurs whether the agreement to extend payment occurs before
22 or after the transaction. See, e.g., *Bocchi Americas Ass'n, Inc. v.*
23 *Commerce Fresh Mktg., Inc.*, 515 F.3d 383, 390 (5th Cir.2008). While
24 the Ninth Circuit has yet to address this issue, there is no reason
25 to think it will refuse to follow its sister circuits' lead.

26 There is a sharp dispute with respect to whether Messrs. Yarto
and Winkler had to begin making payments to 11 R and Borton during
the Fall of 2006 for purchases that WashEx made prior to October
12th. However, even if Messrs. Yarto and Winkler had such an

1 obligation, Borton and 11 R gave them more than 30 days from October
2 12th to complete payment. Thus, 11 R and Borton have waived PACA
3 trust protection with respect to the purchases that WashEx made
4 before October 12, 2006.

5 On or about April 10, 2007, Borton and 11 R entered into the
6 Conditional Forbearance agreement with WashEx. YITC was not a party
7 to the contract. The Conditional Forbearance gave WashEx more than
8 30 days to pay for some of its post-October 12th fruit purchases from
9 11 R and Borton. Consequently, as to those purchases, Borton and 11
10 R arguably forfeited PACA trust protection. In other words, WashEx
11 obtained control of the fruit free from a PACA trust. Thereafter,
12 WashEx sold the fruit to YITC. Since YITC is a produce dealer, one
13 would tend to assume that YITC obtained control of the fruit subject
14 to a PACA trust; provided, of course, that WashEx complied with the
15 statutory requirements necessary to establish one. "Not so," says
16 YITC. According to YITC, a single trust comes into existence when a
17 producer sells perishable agricultural commodities to a dealer. To
18 YITC's way of thinking, if a producer forfeits trust protection after
19 placing perishable agricultural commodities in the stream of
20 commerce, the trust dissolves. YITC argues that, once a PACA trust
21 dissolves, no "downstream" seller can recreate it.

22 YITC's interpretation of PACA raises a complex issue of
23 statutory construction. *Cf. Axess International, Ltd. v. Intercargo*
24 *Ins. Co.*, 183 F.3d 935, 941 (9th Cir.1999) ("In construing a statute
25 in a case of first impression, we look to the traditional signposts
26 of statutory construction: first, the language of the statute itself;

1 second, its legislative history, and as an aid in interpreting
2 Congress' intent, the interpretation given to it by its administering
3 agency." (quoting *Funbus Sys., Inc. v. State of California Pub.*
4 *Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir.1986))). At oral
5 argument, YITC cited a number of authorities in support of its
6 interpretation. For example, the Secretary of Agriculture has
7 promulgated a regulation that states:

8 The trust is made up of perishable agricultural commodities
9 received in all transactions, all inventories of food or
10 other products derived from such perishable agricultural
11 commodities, and all receivables or proceeds from the sale
12 of such commodities and food or products derived therefrom.
13 Trust assets are to be preserved as a nonsegregated
14 "floating" trust. Commingling of trust assets is
15 contemplated.

16 7 C.F.R. 46.46(b). Relying, in part, upon this regulation, the
17 Second Circuit has held "that a single PACA trust exists for the
18 benefit of all of the sellers to a Produce Debtor, and continues in
19 existence until all of the outstanding beneficiaries have been paid
20 in full." *Tom Lange Co. v. Kornblum & Co. (In re Kornblum & Co.)*, 81
21 F.3d 280, 286 (2d Cir.1996). The preceding rule would provide
22 important guidance were this a situation in which multiple producers
23 sold fruit to a single purchaser, the purchaser went bankrupt, and
24 the sellers were competing against each other for whatever remained
25 of the purchaser's assets. But this is not such a situation. Here,
26 the issue is whether a downstream purchaser/seller (*i.e.*, WashEx) is
bound by the upstream sellers' (*i.e.*, 11 R's and Borton's) forfeiture
of PACA trust protection.

At this juncture, the Court declines to adopt YITC's

1 interpretation of PACA. To begin with, the opposing parties did not
2 have a reasonable opportunity to evaluate and respond to the
3 authorities cited by YITC at oral argument. More importantly, YITC
4 YITC has not cited a single case in which a court has resolved this
5 issue against a downstream seller. Given the absence of persuasive
6 authority, much less precedent, YITC is not entitled to summary
7 judgment at this time.

8 **SUMMARY**

9 A rational jury could not find that Messrs. Yarto and Winkler
10 were coerced into signing the disputed contracts. Subparagraphs "A"
11 through "E" of paragraph 2 of the Settlement Agreement are not
12 conditions precedent to Mr. Yarto's and Mr. Winkler's duty to perform
13 the promises that they made. Mr. Yarto's and Mr. Winkler's agreement
14 to guarantee the obligations assumed by Messrs. Munguia and Lublin in
15 paragraph 2.A is an absolute guarantee. Genuine issues of material
16 fact exist with respect to whether the parties to the Settlement
17 Agreement intended Messrs. Munguia and Lublin to pay the entire
18 \$2,042,000 to Evans and Borton. Genuine issues of material fact
19 exist with respect to whether the parties intended Messrs. Yarto and
20 Winkler to begin making payments on the promissory notes during
21 October of 2006. The record is insufficiently well developed for the
22 Court to determine whether 11 R and WashEx breached the Settlement
23 Agreement by filing actions prior to January 31, 2007. The record is
24 insufficiently well developed for the Court to determine whether
25 Evans and Borton discharged Messrs. Yarto and Winkler as sureties
26 pursuant to the rule set forth in *Lincoln v. Transamerica Investment*,

89 Wn.2d 571, 574, 573 P.2d 1316 (1978). To the extent that 11 R and Borton gave Messrs. Yarto and Winkler more than 30 days to pay for purchases which were made before October 12, 2006, 11 R and Borton have waived PACA trust protection as to those purchases. The record is insufficiently well developed for the Court to determine whether WashEx is bound by 11 R's and Borton's PACA waivers.

IT IS HEREBY ORDERED:

1. 11 R Sales' summary judgment motion (**Ct. Rec. 36**) is **denied**.

2. Mr. Yarto's and Mr. Winkler's summary judgment motion (**Ct. Rec. 57**) is **denied**.

3. Washington Export's, Mr. Munguia's, and Mr. Lublin's motion to dismiss Mr. Yarto's and Mr. Winkler's duress defense (**Ct. Rec. 105**) is **granted**. Furthermore, on its own motion, the Court dismisses their duress defense as it relates to the claims asserted by Borton, Evans, and 11 R Sales.

4. Borton's summary judgment motion (**Ct. Rec. 123**) is **denied**.

5. Mr. Yarto's, Mr. Winkler's, YITC's, and YIG's summary judgment motion (**Ct. Rec. 128**) is **denied** except as indicated above.

6. The Court will set a scheduling conference.

THE DISTRICT COURT EXECUTIVE is hereby directed to enter this order and furnish copies to counsel.

DATED this 15th day of September, 2008.

s/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge